Supreme Court, U.S.
FILED
07-240 AUG 20 2007
OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

LAWRENCE RANDALL McCONNELL, individually; DEBORAH ELLEN McCONNELL, individually; LAWRENCE RANDALL McCONNELL and DEBORAH ELLEN McCONNELL, as surviving parents of Joseph James McConnell, deceased,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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August 20, 2007

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Questions Presented

- **Applying *Feres*.** *Feres v. United States* bars claims for servicemen injured incident to military service.[1] Lt. Joseph McConnell and two friends were waterskiing at a civilian lake, using a boat that another friend had rented on base. Because the government had negligently maintained and inspected the boat, its throttle-control cable broke. The boat surged forward, striking and killing McConnell. When he died, McConnell had no military mission or duties. Does *Feres* bar his parents' wrongful-death claim?

- **The Conflicting *Feres* Tests.** Courts have sharply split on what test to use for *Feres* cases involving off-duty and recreational injuries. In fact, to resolve those cases, courts have invented and use at least four conflicting tests. And so justice for *Feres* claimants now varies regionally. Should this Court end the inter-circuit conflict by imposing a uniform rule for these cases?

- **The Ninth Circuit's Four-Factor *Feres* Test.** For *Feres* cases, the Ninth Circuit uses a four-factor test based on when and where the government committed negligence. But government negligence – and the injury it causes – often do not occur at the same time and place. McConnell, for instance, died at a civilian lake – not on the military base where the government had earlier committed negligence. As *McConnell* shows, the four-factor test can create irreconcilable results. Should this Court abrogate the Ninth Circuit's test?

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[1] *Feres v. United States*, 340 U.S. 135, 146 (1950).

Parties to the Proceeding

The parties to the proceeding before this Court are:

The petitioners: Lawrence Randall McConnell, individually; Deborah Ellen McConnell, individually; Lawrence Randall McConnell and Deborah Ellen McConnell, as surviving parents of Joseph James McConnell, deceased.

The respondent: The United States of America.

Corporate Disclosure Statement

None of the parties is a business or corporate entity of any kind.

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In the
SUPREME COURT OF THE UNITED STATES

LAWRENCE RANDALL McCONNELL, individually; DEBORAH ELLEN McCONNELL, individually; LAWRENCE RANDALL McCONNELL and DEBORAH ELLEN McCONNELL, as surviving parents of Joseph James McConnell, deceased,

Petitioners,

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UNITED STATES OF AMERICA,

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petition for Writ of Certiorari

Petitioners respectfully seek a Writ of Certiorari to review the United States Court of Appeals for the Ninth Circuit's opinion upholding dismissal of this case under *Feres v. United States*.

Opinions and Orders Below

(1) The district court's unpublished December 10, 2004 Order (filed December 13, 2004). Pet App. 15a-37a.

(2) The court of appeals' March 8, 2007 published opinion. *McConnell v. United States*, 478 F.3d 1092 (9th Cir. 2007). Pet. App. 2a-14a.

(3) The court of appeals' unpublished May 29, 2006 Order denying the petition for rehearing and the petition for rehearing en banc. Pet. App. 1a.

Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1257(a), 28 U.S.C. § 1291, and SUP. CT. R. 13(1).

Statutory Provisions Involved

28 U.S.C. § 1346(b)(1) – [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages [for] personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2674 – The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances.

Standard of Review

In *Feres* cases, courts review dismissal motions *de novo*, construing all material facts in the non-moving party's favor.[2]

Statement of the Case

An Air Force student-pilot's parents are suing the government for negligently causing their son's death. Because no one disputes what happened, the following factual summary comes from the court of appeals' opinion.[3]

In May 2001, Lt. Joseph McConnell was enjoying off-duty time with two friends at Lake Pleasant, a civilian reservoir. All of them were Air Force officers attending an advanced fighter-pilot school near Phoenix, Arizona. But on this day they were just waterskiing with a boat that another student-pilot had rented from the base recreation center. Each pilot knew that government rules controlled the boat's use. But even under those rules, civilians could use the boat if someone in the military supervised them.

McConnell fell while skiing and was treading water waiting for his friends to pick him up. As the boat neared McConnell, the friend driving it pulled back on the throttle lever. But instead of slowing, the boat surged forward, hitting and instantly killing McConnell. Neither he nor his friends caused this accident. In fact, the police discovered that the throttle-control cable had snapped, letting the boat's motor

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[2] *Wilkins v. United States*, 279 U.S. 782, 785 (9th Cir. 2002); *Adams v. United States*, 728 F.2d 736, 738 n.3 (5th Cir. 1984).

[3] *McConnell*, 478 F.3d at 1093-94.

race uncontrollably. McConnell's parents also investigated. They learned that the cable broke because the recreation center had negligently inspected and maintained it.

McConnell's parents sued the government. Before they could complete any discovery, however, the district court applied *Feres* and dismissed their case. The district court agreed with the government that McConnell had died incident to service. And the court of appeals affirmed.[4]

But in his concurring opinion, Circuit Judge Ronald Gould worried that Ninth Circuit precedent on *Feres* created "an injustice." He considered it "unrealistic" for the court to dismiss the parents' claim as a way "to foster military discipline." And he predicted that "many might welcome the Supreme Court's clarification of the doctrine's application in the case of military-sponsored recreational programs."[5]

Reasons for granting the petition

There are four main reasons to grant this petition. All raise important issues of federal law. First, the court of appeals' opinion veered far from *Feres*. McConnell did not die incident to military service. Indeed, this Court never meant for *Feres* to bar recovery when the sole link to military service is happenstance. *McConnell* therefore clashes with *Feres* – and with all of this Court's opinions applying it. If *McConnell* stands, it will mislead other courts and deny justice to other deserving claimants.

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[4] *McConnell*, 478 F.3d at 1098.

[5] *Id.* (Gould, C.J., concurring).

Second, the Ninth Circuit used a self-invented, four-factor test to resolve *McConnell*. But the test works poorly when the government commits negligence at a time and place different from the injury's time and place. Here, in fact, the test did not work at all.[6] Even worse, at least one other circuit has adopted the faulty four-factor test.[7] *McConnell* offers a chance to abolish the test, resolving an important legal question for Ninth Circuit courts and claimants. And perhaps just as important, it will keep the test from migrating further.

Third, for off-duty and recreational cases, *McConnell* contributes to the blurring of *Feres*' incident-to-service focus. Many would welcome "the Supreme Court's clarification of the doctrine's application in the case of military-sponsored recreational programs."[8]

Fourth, *McConnell* illustrates a deeper and broader problem. And that is this Court's failure to impose a test for applying *Feres* in off-duty and recreational cases. Lacking guidance, the circuits have concocted four conflicting tests. So the justice claimants receive varies geographically. But justice that mere geography dictates is inherently uneven and unfair.

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[6] *See* Section 2 of this Petition. *See also* Jennifer L. Carpenter, Latchum v. United States: *The Ninth Circuit's Four-Factor Approach to the* Feres *Doctrine*, 25 U. HAW. L. REV. 231, 232 (Winter 2002) (The four-factor test inadequately serves the *Feres* doctrine's incident-to-service test because it does not correlate to the FTCA's intent of the FTCA or to the three *Feres* rationales. So "the four-factor test has resulted in an inconsistent and exponential application of the *Feres* bar.").

[7] *See Pringle v. United States*, 208 F.3d 1220, 1224 (10th Cir. 2000).

[8] *McConnell*, 478 F.3d at 1098 (Gould, C.J., concurring).

This Court should end the four-way conflict and impose a uniform test.

1. The parents may sue because this case resembles *Brooks* far more than *Feres*.

McConnell did not die incident to service. Instead, friendship with military officers – not military service – led to McConnell's death. After all, one of McConnell's military friends rented the defective boat on base. That friend let McConnell and two other military friends use it waterskiing. The boat then killed McConnell. If McConnell had not been friends with these military officers, he would not have been waterskiing. And he would have lived.

But the causation is purely factual – not legal. McConnell also would have lived if he had just stayed in bed that day. That is, as this Court wrote in *Brooks v. United States*, McConnell's death did not depend upon his military service "except in the sense that all human events depend upon what has already transpired."[9]

In fact, our case matches *Brooks*, where this Court endorsed a recovery. In *Brooks*, two soldiers were driving on a public highway in their father's private car. The soldiers were off duty, off base, on no military mission, and under no military orders. And they were executing no military duties.[10] Both soldiers were simply "on leave or furlough, engaged in their private concerns, and not on any business connected with

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[9] 337 U.S. 49, 52 (1949).

[10] *Feres*, 340 U.S. at 146.

their military service."[11] A civilian Army employee crashed an Army truck into their car, killing one soldier and badly injuring another. *Brooks* allowed the resulting lawsuit because the soldiers' injuries "had nothing to do with [their] army careers . . . except in the sense that all human events depend upon what has already transpired." This Court and other courts have repeatedly cited and relied on *Brooks*.[12]

Feres, on the other hand, adjudicated three cases anchored to military duties on military bases.[13] In two cases, military doctors malpracticed on soldiers at military hospitals. In the third case, a barracks fire killed a soldier.[14] All actors and victims in the *Feres* cases were acting under military orders on military bases. And because all injuries were incident to military service, *Feres* held that the government could not be sued.

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[11] *United States v. Brooks*, 169 F.2d 840, 841 (4th Cir. 1948), *rev'd*, 337 U.S. 49 (1949).

[12] *United States v. Brown*, 348 U.S. 110, 112 (1954) ("The *Feres* decision did not disapprove of the *Brooks* case. It merely distinguished it, holding that the Tort Claims Act does not cover 'injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.'"); *United States v. Johnson*, 481 U.S. 681, 698 (1987) ("*Brooks* remained valid after *Feres*.").

[13] Four years after *Feres*, this Court held that *Feres* applied only to injuries that "arise out of or in the course of military duty." *Brown*, 348 U.S. at 113. This Court has "never deviated" from its understanding of the *Feres* incident-to-service bar. *Johnson*, 481 U.S. at 686.

[14] *Feres*, 340 U.S. at 136-37.

But *Feres* then ratified *Brooks*.[15] *Feres* recognized that the injuries in *Brooks* "did not arise out of or in the course of military duty."[16] Indeed, *Feres* emphasized that *Brooks* involved off-base, off-duty soldiers "under compulsion of no orders or duty and on no military mission."[17] Therefore, in *Brooks* – unlike in *Feres* – the accident victims' relationship to the military "was not analogous to that of a soldier injured while performing duties under orders."[18]

While *Brooks* (1949) predates *Feres* (1950), the two cases are uniquely interdependent. For injuries to off-duty, off-base servicemen, *Brooks* explains where there is liability – and *Feres* explains where there is not. And only by analyzing *Brooks* and *Feres* together does *Feres* make sense for cases involving servicemen injured off-base and off-duty.

Because of the interplay of these two cases, McConnell's parents can seek a recovery for their son's death. After all, like the soldiers in *Brooks*, McConnell was: (1) off duty, (2) off base, (3) under compulsion of no orders, (4) on no military mission, and (5) performing no duties under military orders.[19] McConnell had no military supervision or mission. His death was not "analogous to that of a soldier injured while

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[15] *Feres*, 340 U.S. at 138. *See Taber v. Maine*, 67 F.3d 1029, 1039 (2nd Cir. 1995) (*Feres* neither overruled *Brooks* nor limited *Brooks* to its facts.).

[16] *Feres*, 340 U.S. at 146.

[17] *Id.*

[18] *Id.*

[19] *Id.*

performing duties under orders."[20] Finally, neither his death nor this lawsuit will harm military discipline.[21] Jointly applied, *Brooks* and *Feres* let this case go to trial.

2. The court of appeals' four-factor test misapplies *Feres*.

The Ninth Circuit, however, did not jointly apply *Feres* and *Brooks* to determine if McConnell had died incident to service. Instead, the court used its own four-factor test. Just before launching into that test, however, *McConnell* acknowledged the inconsistency plaguing the circuit's *Feres* cases.[22] Since those cases depend on the circuit's flawed four-factor test, discrepancies naturally occur.[23] So while many federal courts criticize *Feres*,[24] **only** the Ninth Circuit

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[20] *Id.*

[21] *See* Section 4 of this Petition.

[22] *McConnell*, 478 F.3d at 1095.

[23] Among the many Ninth Circuit *Feres* opinions using the four-factor test – and complaining about resulting irreconcilability – are *McConnell*; *Schoenfeld v. Quamme*, 2007 WL 1880982 (9th Cir. July 2, 2007); *Dreier v. United States*, 106 F.3d 844, 848 (9th Cir. 1996); and *Costo v. United States*, 248 F.3d 863, 867 (9th Cir. 2001), *cert. denied*, 534 U.S. 1078 (2002).

[24] See, e.g., *Matreale v. New Jersey Dept. of Military & Veterans Affairs*, 487 F.3d 150, 159 (3rd Cir. 2007) (Smith, C.J., concurring) ("Prior panels of this Court, of other courts of appeals, and numerous commentators have questioned the soundness of the *Feres* doctrine.").

condemns its **own** *Feres* cases as irreconcilable.[25] That fact speaks loudly about the usefulness of the four-factor test, which examines the:

- Place of negligence;
- Duty status when negligence occurred;
- Benefits accruing because of military service; and
- Nature of serviceman's activities when negligence occurred.[26]

At first glance, the test seems helpful. But when negligence occurs at a time and place separate from the accident's time and place, the four-factor test crumbles. After all, in those cases the link between negligence and military service totters – or crashes entirely.

In *McConnell*, for example, even after discovery we may never learn exactly when or where the government blundered. As far as **when**, the government could only mishandle the boat after buying it. And as far as **where**, the government presumably bungled its boat care on a military base. But those factors form no link with McConnell's pre-accident waterskiing activities and location.

Yet three of the test's four factors exclusively depend on when and where the government committed negligence. But a test not linking negligence with military service cannot help in deciding if an injury is incident to service. Examining each test factor strengthens that conclusion.

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[25] *See, e.g.*, *Costo*, 248 F.3d at 867 ("[W]e have reached the unhappy conclusion that the cases applying the *Feres* doctrine are irreconcilable.").

[26] *Id.* (relying on *Costo*, 248 F.3d at 867).

A. The place of the government's negligence is irrelevant.

We may never know for certain, but the government presumably committed negligence at McConnell's base. That presumption, however, still creates no link with McConnell's military service. Indeed, when McConnell died in 2001, he was only 24 years old. But the Marlin Company made the boat in 1990.[27] So McConnell may not have even been in Arizona when the government negligently mishandled the boat. Thus, we have no way to link McConnell's service with the place of negligence – making that factor irrelevant.

B. McConnell's duty status at time of negligence is irrelevant.

We may likewise never learn exactly <u>when</u> the government was negligent. The range goes from 1990 (boat manufacture) to 2001 (death). Thus McConnell was probably not even an airman – much less on any duty status – when the government committed negligence. Thus, the "duty status at time of negligence" factor is also irrelevant.

C. McConnell's service benefits are irrelevant.

McConnell's military service led to friendships that ultimately brought McConnell to the lake. But friendship is a personal gift. McConnell's presence at the lake did not come from any government-provided service benefit. And although the government provided the defective boat, McConnell was only tangentially connected to it. He did not rent it. And when

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[27] The boat was a 1990 Marlin Runabout. "Brief of Appellee" at 4 (May 16, 2005).

the boat struck him, he was not in it, on it, driving it, or skiing behind it. He was simply treading water. Just before his death, nothing singled out McConnell from any civilian at the lake. Indeed, even if McConnell had been a civilian, he still could have used the same boat. The only restriction was that he would have had to use the boat under a serviceman's supervision. Because McConnell's boat use was not an exclusive military benefit, the "benefits" factor is also irrelevant.

D. McConnell's activities at time of negligence are irrelevant.

As we have discussed, because of his youth McConnell was probably not even an airman when the government committed negligence. Indeed, other making him a target, McConnell's activities at the lake had no relation to the government's negligence. The "activities at time of negligence" factor is thus also irrelevant.

3. None of the government's four best arguments wins.

Fairness requires addressing the government's main arguments. The government's best argument is that the Ninth Circuit's four-part test works well generally - and worked well here. And in fact, the test seems useful. But examined factor-by-factor - as we have just done - the test capsizes in recreational and off-duty cases. And its unrestricted use has increasingly created irreconcilable Ninth Circuit opinions.

The government's second-best argument is that *McConnell* parallels *Costo v. United States*.[28] In that case, the Ninth Circuit applied *Feres*, and this Court denied the petition for writ of certiorari. But the second-best argument fails for two reasons. First, denying a petition for writ of certiorari is neither precedent nor approval.[29] Second, the facts in *Costo* differ. In *Costo*, two sailors drowned on a whitewater-rafting trip that the Navy sponsored, planned, managed, and led. Navy employees supervised, escorted, and guided the sailors, and even tried to rescue them when the river pulled them under a submerged log. But unlike *Costo*, the military connection in *McConnell* is almost nonexistent. In *McConnell*, all the government did was provide a defective boat and tell three unsuspecting pilots to use it responsibly. McConnell had a trifling connection with the boat. And no one at the lake caused the accident or acted irresponsibly. Simply stated, the government botched its boat care far from when and where the boat killed McConnell. *Costo* and *McConnell* are thus unlike in all relevant ways.

The government's third-best argument is that *McConnell* is the same as *Bon v. United States*.[30] In *Bon*, a sailor drove a Navy recreational motorboat into a Navy recreational canoe in San Diego harbor. The collision badly injured the sailor paddling the canoe. She sued the government, alleging that it had negligently: (1) let an unfit or drunk sailor operate the boat; (2) supervised and controlled the boat's operator; and

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[28] 248 F.3d 863 (9th Cir. 2001), *cert. denied*, 534 U.S. 1078 (2002).

[29] *Teague v. Lane*, 489 U.S. 288, 296 (1989).

[30] 802 F.2d 1092 (9th Cir. 1986).

(3) entrusted, managed, and operated the boat.[31] In our case, however, there was no direct on-site government control over the boat that killed McConnell. And there was nothing like *Bon*'s firsthand negligent control and supervision over the serviceman who had caused the canoe-motorboat collision. Because *Bon* is unlike *McConnell*, the government's third-best argument also fails.

The government's fourth-best argument may be that McConnell's parents once asserted a failure-to-warn claim. But the parents long ago abandoned that theory. This case is now solely about the government negligently maintaining and inspecting the boat.

4. The parents' lawsuit does not threaten military discipline.

The court of appeals fortified its four-factor test by referring to the three policy rationales underlying *Feres*. The three rationales are:

- Distinctively federal nature of the relationship between the government and its servicemen;
- Generous compensation scheme providing ample alternative to a tort recovery; and

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[31] McConnell's parents attached the *Bon* complaint to "Plaintiff-Appellants' Motion for Leave to Supplement Record on Appeal" (Dec. 18, 2006). The *Bon* appellate opinion did not fully reveal the injured sailor's liability allegations. So McConnell's parents obtained a copy of the *Bon* complaint, and asked the Ninth Circuit to take judicial notice of it – which the court did. *McConnell*, 478 F.3d at 1096 n.4.

- Endangerment of military discipline if servicemen can sue the armed forces.[32]

The court of appeals, however, did not examine either: (1) the relationship's federal nature or (2) the alternative compensation scheme. After mentioning those rationales, the court ignored them, thus making them irrelevant. Instead, the court focused on the military-discipline rationale. The court believed that the lawsuit might threaten military discipline by delving into or disturbing:

- A military mission.
- Military management.
- The base's command structure and boat regulations.
- Boat-use instructions and compliance with them.
- The state-law standard of care.[33]

But none of these policy-connected concerns supports applying *Feres* to bar the parents' lawsuit.

A. This case concerns no military mission.

The court of appeals decided that "McConnell's recreational use of the motorboat was related to his overall military mission."[34] The court found that he was "engaged in a military-sponsored recreational activity" – apparently equating that with a military mission's "support."[35] But the

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[32] *McConnell*, 478 F.3d at 1095

[33] *Id.* at 1098.

[34] *Id.* at 1098.

[35] *Id.* at 1094 n.1 and 1097, n.7.

court of appeals never explained what military mission McConnell was pursuing. Nor did it explain how this lawsuit would imperil any military mission. Instead, the court of appeals apparently decided the case under this implicit syllogism:

Major premise: No one may sue for a serviceman killed on a military mission.

Minor premise: McConnell was a serviceman killed on a military mission.

Conclusion: No one may sue for McConnell's death.

But four defects defeat the syllogism: ***First***, recreation is not a military mission. Our military's mission is "to fight or be ready to fight wars should the occasion arise."[36] In that spirit and tradition, President Harry Truman and Congress founded the Air Force "for the effective prosecution of war."[37] And war remains its mission.[38] As for McConnell, his supporting military mission as an Air Force pilot was learning combat at a fighter-pilot school. Once trained, McConnell

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[36] *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955).

[37] NATIONAL SECURITY ACT OF 1947, § 207, 61 Stat. 496 (current version at 10 U.S.C. § 8062). *See also* U.S. AIR FORCE, AIR FORCE STRATEGIC PLAN: 2006-2008 (2006) (not listing recreation as a mission); 10 U.S.C. § 8062 (not mentioning recreation as an Air Force mission).

[38] WARREN A. TREST, AIR FORCE ROLES AND MISSIONS: A HISTORY (1998); RICHARD I. WOLF, THE UNITED STATES AIR FORCE: BASIC DOCUMENTS ON ROLES AND MISSIONS (1988).

would have fought – or would have been ready to fight – in America's wars.

McConnell's military mission was never waterskiing. That was merely a way that he – or a civilian – could spend free time. In fact, McConnell could use his off-duty hours almost any way he liked.[39] Thus, he could use his free time waterskiing – without transforming that individual recreation into a military mission.

Amazingly, the government asserted that recreational activities are "core military functions, no less than combat training and military medical care."[40] Even more amazingly, the court of appeals agreed. But what air force could function – or long survive – if it regarded a frippery like waterskiing as a core military function? In a roundabout way, waterskiing may support the military mission. But it is not a core military function – much less in itself a credible military mission.

And although the UCMJ always applies to servicemen, that does not mean that servicemen are always on military missions.[41] Nor does it make them eternally subject to *Feres*.[42]

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[39] A military officer absent from duty "with leave" is "at liberty to go where he will during the permitted absence [and] to employ his time as he pleases." *United States v. Williamson*, 90 U.S. 411, 415 (1874).

[40] *McConnell*, 478 F.3d at 1097 n.6.

[41] The "UCMJ" is the Uniform Code of Military Justice.

[42] *See, e.g., Schoenfeld v. Quamme*, 2007 WL 1880982 (9th Cir. July 2, 2007) (A Marine's leg was amputated after the marine's car crashed into a defective on-base guardrail. Although the marine was always subject to the UCMJ, *Feres* did not bar his lawsuit.);

As *Brooks* confirms, even servicemen get time off. They can leave military property for personal recreation without automatically being on military missions.

Second, since McConnell's pre-death activities and location were so distant from the government's negligence, this lawsuit harms no military mission.

Third, the parents' lawsuit will not harm the Air Force. If the parents win, the Air Force's military mission will continue undamaged. Indeed, giving these parents their day in court may actually boost the military's image. It will show a willingness to admit error. And that candor will bolster the Air Force's military mission far more than renting any number of defective boats.

Fourth, because he is dead, the parents' lawsuit will not impinge on McConnell's personal military mission. His parents only ask to hold the government accountable for the preventable negligence that killed their son.

B. The case does not implicate military management.

This lawsuit does not jeopardize military management – that is, "basic choices about the discipline, supervision, and control of a serviceman."[43] Moreover, the military's internal structure will not dissolve if these parents can sue. If anything, servicemen may respect the government far more

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Johnson v. United States, 704 F.2d 1431, 1438 (9th Cir. 1983) ("The fact that Johnson was off-duty for the day is, under the circumstances presented here, sufficient to eliminate any relevant links between his activities and his military service.").

[43] *United States v. Shearer*, 473 U.S. 52, 58 (1985).

for accepting potential responsibility. And that can only improve military management – not harm it.

This Court wanted *Feres* to fortify military management by barring claims for servicemen injured "while on duty."[44] After all, broad liability could cripple "instinctive obedience" to orders and thwart "disciplined responses."[45] But here those concerns are absent. McConnell's parents are not making expansive claims. They only allege that simple negligence killed their son when he was doing nothing plausibly related to military service. Holding the government liable will not undermine disciplined responses, instinctive obedience, military management – or any other aspect of military discipline.

C. The base's command structure and regulations are irrelevant.

The court of appeals believed that the parents' lawsuit might explore the base's command structure and boat regulations. But Arizona law controls – and takes a different approach.[46] In Arizona, what matters is compliance with a general boat-rental standard.[47] That is, the government is

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[44] *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 673 (1977).

[45] *United States v. Stanley*, 483 U.S. 669, 702 (1987); *Chappell v. Wallace*, 462 U.S. 296, 304 (1983).

[46] 28 U.S.C. § 1346(b)(1); 28 U.S.C. § 2674.

[47] *See, e.g., Stanley v. McCarver*, 208 Ariz. 219, 224, 92 P.3d 849, 854 (2004) (The duty is always to conform to the legal standard of reasonable care in light of the apparent risk.); *Bell v.*

liable if it did not care for the boat as well as a reasonably-careful boat-rental company. The base's command structure – and regulations – are thus irrelevant.

Nor do the parents want or need to second-guess or criticize the government. Recriminations cannot heal their loss. What matters for their case is proving that the government botched its care of one boat. Indeed, the boat's care required no special military skills or equipment. And in the final analysis, it was just a basic inspection-and-maintenance oversight that killed McConnell. Since the government breached its care standard, no regulations or command structure can save it from ordinary tort liability.[48]

D. Boat-use instructions are irrelevant.

The court of appeals worried that this case might explore the boat-use instructions that base personnel supposedly gave. The court also feared that McConnell's parents might investigate if officers at the lake violated any instructions. But no one at the lake did. When the cable broke, the boat instantly lurched forward and killed McConnell. There was no time to react, much less to follow – or not follow – any instructions. Boat-use instructions are irrelevant.

Maricopa Medical Center, 157 Ariz. 192, 194, 755 P.2d 1180, 1182 (App. 1988) (For a negligence action, the standard is that of the conduct of a reasonably prudent man under the circumstances.).

[48] *Sosa v. Alvarez-Machain*, 542 U.S. 692, 707 n.4 (2004).

E. This case properly uses a state-law standard of care.

The court of appeals thought this case might require a civilian court to evaluate "whether the recreational program met some standard of care." That concern is overbroad. McConnell's parents only want to prove that the government negligently cared for one boat. They are not attacking the recreational program as a whole. Moreover, the FTCA has always evaluated liability under "the law of the place where the act or omission occurred."[49] Thus, in FTCA cases civilian courts decide whether the federal government has met a state-law care standard. To use that fact to end this case would nullify the FTCA as Congress drafted it.

5. The fractured circuits need this Court's guidance.

Federal courts sharply disagree on how to apply *Feres* in off-duty and recreational cases. In fact, courts have devised at least four different tests. Most courts – including those in the Third, Fourth, Fifth, Sixth, Eighth, Eleventh, and District of Columbia Circuits – observe a three-factor test. It focuses on the serviceman and the injury site, considering:

- Duty status when injured.
- Accident site.
- Nature of the serviceman's activities when injured.[50]

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[49] 28 U.S.C. § 1346(b)(1).

[50] *Richards v. United States*, 176 F.3d 652, 655 (3rd Cir. 1999), *cert. denied*, 528 U.S. 1136 (2000) (*Feres* barred claim for off-duty serviceman killed on a public highway when a military fuel truck broadsided his private car.); *Shoen v. United States*, 885 F. Supp. 827, 829 (E.D.N.C. 1995) *aff'd*, 81 F.3d 151 (4th Cir. 1996) (*Feres* barred claim for injuries caused by off-duty car crash.);

Courts in the First Circuit, however, emphasize the serviceman's connection to military activities and military control, by analyzing:

- Location of occurrence.
- Injury arising out of military life or military activities.
- Status of perpetrators as persons cooperating with the military.
- Serviceman "in some way" on military service at time of injury.[51]

On the other hand, courts in the Second and Seventh Circuits use their own four-factor test focusing on a serviceman's status, activity, and privileges:

Kelly v. Panama Canal Com'n, 26 F.3d 597, 600 (5th Cir. 1994) (*Feres* did not bar claim for serviceman killed on recreational trip using sailboat rented at on-base marina.); *Fleming v. U.S. Postal Service, Postmaster General*, 186 F.3d 697, 700 (6th Cir. 1999) (*Feres* did not apply to serviceman hit off-base by postal truck while serviceman was on the way to report for duty.); *Tobin v. Pryce*, 983 F. Supp. 880, 884 (D. Neb. 1997) (*Feres* barred claim arising from military-related "recreational" visit to Dachau death camp.); *Whitely v. United States*, 170 F.3d 1061, 1070-75 (11th Cir. 1999) (*Feres* did not apply to serviceman injured off-base using military transportation provided for military-related civilian rugby match.); *Schnitzer v. Harvey*, 389 F.3d 200, 203 (D.C. Cir. 2004) (*Feres* barred claim by soldier injured by ceiling that fell while he was engaged in recreational activity.).

[51] *See, e.g.*, *Brown v. United States*, 410 F. Supp. 2d 3, 6 (D. Mass. 2006) (*Feres* did not apply to Air Force officer injured in an off-duty motorcycle accident caused by negligent placement of guardrail and utility pole.); *Day v. Massachusetts Air National Guard*, 167 F.3d 678, 682 (1st Cir. 1999) (*Feres* barred claim arising from off-duty, unauthorized "hazing" incident.).

- Serviceman's duty status when injured.
- Relationship of activity to service membership.
- Limitation of activity to military personnel.
- Activity a privilege or benefit of military service.[52]

Finally, courts in the Ninth and Tenth Circuits use a four-factor test analyzing the time and place of the government's negligence in relation to the serviceman's duty status and activities:

- Place of negligence.
- Duty status when negligence occurred.
- Benefits accruing because of military service.
- Nature of serviceman's activities when negligence occurred.[53]

In summary, federal courts have never forged a consensus test for applying *Feres* to off-duty and recreational cases like *McConnell*. The reason may be that courts are not examining these cases through the interaction of *Brooks* and *Feres*. But separate tests are inherently unequal.[54]

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[52] *Wake v. United States*, 89 F.3d 53, 58 (2nd Cir. 1996) (*Feres* barred claim by NROTC member injured in car driven by marine sergeant off-base, but on a military-related trip.); *Barry v. Stevenson*, 965 F. Supp. 1220, 1225 (E.D. Wisc. 1997) (*Feres* barred claim for soldier injured when another soldier took military vehicle off-road on unauthorized "frolic and detour.").

[53] *McConnell*, 478 F.3d at 1095; *Pringle v. United States*, 208 F.3d 1220, 1224 (10th Cir. 2000) (*Feres* applied to off-duty injuries sustained after base's social club ejected serviceman.).

[54] *Brown v. Board of Education of Topeka, Shawnee County, Kansas*, 347 U.S. 483, 494 (1954).

Thus, while McConnell's parents lost in the Ninth Circuit, they would have prevailed in circuits using the majority three-factor test. That test depends on duty status (off duty), accident site (off base), and nature of activities (waterskiing). All of those factors favored McConnell's parents. Indeed, the Fifth Circuit upheld a recovery when an officer rented a sailboat on base and died sailing off base.[55] In all essential ways, that case is just like ours. Just the test – and therefore the result – differ.

On the other hand, courts in the First Circuit would have probably dismissed the lawsuit by McConnell's parents. After all, McConnell's death arose from military life. Persons cooperating with the military (recreation center) caused the accident, and McConnell was on military service "in some way."

Then again, in the Second and Seventh Circuits the lawsuit should have survived. McConnell was off-duty and his activities were unrelated to military membership. The waterskiing was not limited to servicemen, and boat-usage was not exclusively a military privilege or benefit.

And from *McConnell* we know the likely unfavorable outcome if the Tenth Circuit uses the Ninth Circuit's four-factor test.

The point is that the test for a particular claimant now hinges on geography. And because the tests are different, they cannot operate equally well or offer equal justice. For instance, this Petition shows that the Ninth Circuit's test works badly. Of the other tests, perhaps the majority three-factor test works best. It is both simpler and focuses more on

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[55] *Kelly v. Panama Canal Com'n*, 26 F.3d 597 (5th Cir. 1994).

service-connection at the injury's time and place. And with that sharper focus, the three-factor test may implement the *Feres* incident-to-service concept better than any other test.

But mere geography should never dictate American justice. Until this Court acts, however, the conflicting tests will continue. After all, nothing hints that the inter-circuit conflict will end spontaneously. The Court should accept this petition, approve an existing test, or craft its own. Otherwise the conflict will linger, harming still other deserving claimants.

Conclusion

McConnell died because the government negligently maintained and inspected a recreational boat. Under *Feres* and *Brooks*, McConnell's death was not incident to military service. Letting his parents sue for their son's wrongful death will neither endanger military discipline nor threaten any military mission.

This Court should provide a fair, uniform test for off-duty and recreational *Feres* cases. That reform will both end the four-way inter-circuit conflict and abrogate the Ninth Circuit's four-factor test. And McConnell's parents will finally be able to find justice at trial.

McConnell's parents respectfully ask the Court to grant their Petition for Writ of Certiorari, to vacate the summary judgment against them and the Ninth Circuit's opinion, and to remand their case to district court for trial.

Respectfully submitted,

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August 2007

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 05-15025

[Filed May 29, 2007]

LAWRENCE RANDALL MCCONNELL; et al., Plaintiffs-Appellants,	)
v.	)
UNITED STATES OF AMERICA,— Defendant-Appellee.	)

D.C. No. CV-03-01886-JAT
District of Arizona, Phoenix

ORDER

Before: T.G. NELSON, GOULD, and CALLAHAN, Circuit Judges.

The Petition for Rehearing is DENIED. The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App, P. 35. Appellant's Petition for Rehearing En Banc is also DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 05-15025

[Filed March 8, 2007]

LAWRENCE RANDALL MCCONNELL; DEBORAH ELLEN MCCONNELL, individually and as surviving parent of Joseph James McConnell, deceased, Plaintiffs-Appellants,	)
v.	)
UNITED STATES OF AMERICA, Defendant-Appellee.	)

Appeal from the United States District Court
for the District of Arizona.
D.C. No. CV-03-01886-JAT.
James A. Teilborg, District Judge, Presiding.

JUDGES: Before: Thomas G. Nelson, Ronald M. Gould, and Consuelo M. Callahan, Circuit Judges. Opinion by Judge Callahan; Concurrence by Judge Gould.

OPINION

The sole issue in this case is whether the *Feres* doctrine, which prohibits suit against the government for injuries that are incident to military service, bars appellants' civil suit against the United States for the tragic death of their son, Lieutenant McConnell, in a waterskiing accident. We determine that under our precedent the facts that Lt. McConnell's use of the boat was a benefit of his status as a service member and that the alleged negligence was subject to military orders and regulations compel us to affirm the district court's grant of summary judgment to the government.

I

This case arises out of a fatal boating accident at Lake Pleasant, Arizona on May 19, 2001. At the time of the accident, Lieutenants Joseph James McConnell, Steven Frodsham, Mark Donohue, and Matthew Crowell were F-16 student pilots in the United States Air Force ("USAF"), assigned to Luke Air Force Base ("Luke AFB"), Arizona. On May 18, the day before the accident, Lt. Crowell rented a 1990 USAF-owned boat from the Luke AFB Recreation Center, located at Luke AFB. Lt. Crowell rented the boat because his colleagues were busy in a meeting. Nevertheless, the record indicates that Lts. McConnell, Frodsham, and Donohue were subsequently briefed on the installation rules and regulations governing the use of the boat, and were required to follow them.

On the morning of May 19, Lts. McConnell, Frodsham, and Donohue transported the boat to Lake Pleasant using McConnell's truck. Lt. Crowell planned to join the group later. At around 10:30 a.m., Lt. Frodsham was driving the boat, Lt. Donohue was in the boat observing, and Lt.

McConnell was waterskiing behind the boat. Lt. McConnell then fell while waterskiing, and Lt. Frodsham steered the boat back around to bring the ski rope to Lt. McConnell, who was floating in the water by use of a life jacket. At that point, Lt. Frodsham attempted to slow the boat down but was unable to do so. Instead, the boat surged out of control and struck Lt. McConnell in the head, causing a fatal brain injury. The police investigation disclosed that the boat's throttle cable had broken 14 feet, 7 inches from the motor. The broken cable kept the throttle stuck at the same position set by the operator immediately before the break and permitted the operator to slow the boat only by turning off the ignition.

The boat was rented pursuant to an agreement with the Luke AFB Recreation Center, which is operated by the Luke AFB Recreation Program. Through the Recreation Center, boat rentals are available to "active duty members and their family members" although civilian guests may use recreational equipment if accompanied and supervised by military personnel. The Recreation Center is part of the broader USAF services programs supporting the Air Force mission.[1] The 56th Services Squadron, Mission Support

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[1] Air Force Instruction 34-262, Services Programs and Use Eligibility, provides:

> **1.1 Purpose.** Services programs support the Air Force mission by contributing to readiness and improving productivity through programs promoting fitness, esprit-de-corps, and quality-of-life for authorized patrons or customers.
>
> * * *

Group, and Fighter Wing Commanders administer the USAF services program at Luke AFB. Among the programs offered are Morale, Welfare, and Recreation ("MWR") Programs, including the Luke AFB Outdoor Recreation Program.

The appellants, Lt. McConnell's parents, filed a complaint against the United States for wrongful death and loss of consortium under the Federal Tort Claims Act. Their complaint is solely against the United States, and no other individuals. They allege that the USAF failed to properly maintain, service, and repair the boat, and failed to warn its users and the public that the boat was defective and unreasonably dangerous.

The district court granted the government's motion for summary judgment, holding that the *Feres* doctrine deprived the court of subject matter jurisdiction. Lt. McConnell's parents filed a timely notice of appeal.

We review a dismissal for lack of subject matter jurisdiction pursuant to the *Feres* doctrine de novo. *Wilkins v. United States*, 279 F.3d 782, 785 (9th Cir. 2002). "Factual findings are reviewed de novo, with all disputed facts resolved in favor of the non-moving party." *Costo v. United States*, 248 F.3d 863, 866 (9th Cir. 2001), *cert. denied*, 534

1.2 Importance. Services programs are vital to mission accomplishment and form an integral part of the non-pay compensation system. . . . Services programs encourage positive individual values and aid in recruitment and retention of personnel. They provide for the physical, cultural, and social needs and general wellbeing of military members and their families, providing community support systems that make Air Force bases hometowns for a mobile military population.

U.S. 1078, 122 S. Ct. 808, 151 L. Ed. 2d 693 (2002) (citing *Dreier v. United States*, 106 F.3d 844, 847 (9th Cir. 1996)).

II

The Federal Tort Claims Act ("FTCA") is a waiver of the federal government's sovereign immunity. *See* 28 U.S.C. §§ 1346(b)(1) (2006), 2679 (2006). Under the FTCA, the United States is liable "in the same manner and to the same extent as a private individual under like circumstances . . . ." 28 U.S.C. § 2674 (2006). However, in *Feres v. United States*, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950), the Supreme Court held that the United States is not liable for injuries that "arise out of or are in the course of activity incident to service" because the United States did not intend to waive its immunity to such claims. *Id.* at 146. "This broad exception has been labeled 'the *Feres* doctrine.'" *Costo*, 248 F.3d at 866.

Subsequent Supreme Court decisions have identified three policy rationales underlying the *Feres* doctrine: "(1) the distinctly federal nature of the relationship between the Government and the members of its armed forces . . ., (2) a generous compensation scheme for soldiers (the Veterans' Benefits Act) serves as an ample alternative to tort recovery, and (3) permitting military personnel to sue the armed forces would endanger discipline." *Id.* at 866 (citing *United States v. Johnson*, 481 U.S. 681, 684 n.2, 107 S. Ct. 2063, 95 L. Ed. 2d 648 (1987)).

The third policy rationale — preserving the integrity of military discipline — is the most robust explanation for the

Feres doctrine and most critical to this case.[2] The Supreme Court has commented:

> The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Torts Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the [*Feres*] Court to read that Act as excluding claims of that character.

United States v. Brown, 348 U.S. 110, 112, 75 S. Ct. 141, 99 L. Ed. 139 (1954); *see also Costo*, 248 F.3d at 866 ("[T]he danger to discipline ... has been identified as the best explanation for *Feres*."); *cf. Zaputil v. Cowgill*, 335 F.3d 885, 887 (9th Cir. 2003) ("The *Feres* doctrine is applicable whenever a legal action would require a civilian court to examine decisions regarding management, discipline, supervision, and control of members of the armed forces of the United States.") (internal quotation marks omitted).

In determining whether a service member's injury is "incident to service" and therefore, barred under the *Feres* doctrine, we have employed a case-by-case approach, addressing four factors:

> (1) the place where the negligent act occurred, (2) the duty status of the plaintiff when the negligent act occurred, (3) the benefits accruing to the plaintiff

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[2] An outline of some of the criticism of the rationales is set forth in our opinion in *Costo*, 248 F.3d at 866-67.

> because of the plaintiff's status as a service member, and (4) the nature of the plaintiff's activities at the time the negligent act occurred.

Costo, 248 F.3d at 867 (citing *Dreier*, 106 F.3d at 848). Moreover, we have stated that none of these factors are dispositive. *Id.* "Rather than seizing on any particular combination of factors, we have focused on 'the totality of the circumstances.'" *Id.* Furthermore, although the various cases applying the *Feres* doctrine may defy reconciliation, we are bound by, and seek to align our resolution of this particular case to, our precedents.[3]

III

Our application of the four factors to the particular facts in this case compels our determination that under our precedent, particularly *Costo* and *Bon v. United States*, 802 F.2d 1092 (9th Cir. 1986), the *Feres* doctrine bars appellants' suit against the government.[4]

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[3] In *Costo*, we noted that "we have reached the unhappy conclusion that the cases applying the *Feres* doctrine are irreconcilable, and thus, comparison of fact patterns to outcomes in cases that have applied the *Feres* doctrine is the most appropriate way to resolve *Feres* doctrine cases. *Dreier* [*v.* United States], 106 F.3d [844,] 848 [(9th Cir. 1996)] (citing *Estate of McAllister* [*v.* United States], 942 F.2d [1473,] 1477 [(9th Cir. 1991)])." *Costo*, 248 F.3d at 867 (internal quotation marks omitted).

[4] Appellants have filed a motion for leave to supplement the record on appeal with the underlying complaint in *Bon* as well as portions of the government's appellate brief in *Bon*. In the alternative, appellants ask that we take judicial notice of "the public records presented from the *Bon* district court and appellate files." The government opposes the motion for leave to supplement the record,

Although appellants stress that the accident occurred on a public lake, the district court properly focused on the situs of the negligence, not the location of the accident. *Costo*, 248 F.3d at 868 ("The appropriate consideration is the 'situs of the negligence, ' not the location of the accident."); *see also Johnson v. United States*, 704 F.2d 1431, 1436 (9th Cir. 1983) ("[T]he place on the base where the negligent act was found by the trial court to have occurred must be distinguished from the place where the accident occurred.");[5] *Monaco v. United States*, 661 F.2d 129, 132-33 (9th Cir. 1981) (holding that a father's claim for cancer that was diagnosed after he left the service, and his daughter's claim arising out of her birth defect, were barred by the *Feres* doctrine because the alleged negligence — the father's exposure to radiation — occurred when he was on active duty). Here, the appellants allege that the USAF failed to service and repair the boat and do not dispute that the boat was serviced and repaired, if at all, at Luke AFB. Thus, unlike *Costo*, where much of the alleged negligence occurred on base, here *all* the alleged negligence occurred on base. However, the location of the negligence is not dispositive, and we must also consider the other factors. *See Johnson*, 704 F.2d at 1437.

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and urges that judicial notice be limited to the fact that the two documents contain certain allegations and not extend to the veracity of those allegations.

We hereby grant appellants' motion for judicial notice and deny their motion to supplement the record.

[5] The Supreme Court's decision in *United States v. Johnson*, 481 U.S. 681, 107 S. Ct. 2063, 95 L. Ed. 2d 648 (1987) is not related to the Ninth Circuit's case, *Johnson v. United States*, 704 F.2d 1431 (9th Cir. 1983).

The parties agree that Lt. McConnell was on leave but on active duty at the time of the accident. The plaintiffs in *Bon* and *Costo* were "on liberty" at the time of the accidents, but also on active duty. *Costo*, 248 F.3d at 867. Similar to the plaintiffs in *Bon* and *Costo*, the record indicates that Lt. McConnell was still subject to military orders and discipline though on leave. *Cf. Charland v. United States*, 615 F.2d 508, 509 (9th Cir. 1980) ("Although on furlough he remained on active duty and was subject to military orders and discipline at all times while on board the Navy vessel."). Nevertheless, Lt. McConnell was not on duty at the time of the accident. Accordingly, this factor, although not dispositive, may weigh against the application of the *Feres* doctrine.

The district court found that Lt. McConnell's use of the motorboat was a benefit of his position as a USAF serviceman. Appellants, however, argue that because Lt. McConnell did not rent the boat, he was more similarly situated to a civilian, like the service members in *Dreier*, 106 F.3d at 844, and *Johnson*, 704 F.2d at 1431. These cases can be distinguished. In *Dreier*, we held that because there was evidence that anyone could access the Solo Point area — even civilians without a permit — Dreier's presence at Solo Point was not a benefit of his military status. The *Dreier* court distinguished *Bon* as an instance where "use of the Center was restricted to members of the military and employees of the Department of Defense and their guests and dependents." *Dreier*, 106 F.3d at 851 (quoting *Bon*, 802 F.2d at 1095) (internal quotation marks and brackets omitted).

Similarly, in *Johnson*, the court identified Johnson's after-hours employment at the non-commissioned officers club with work routinely performed by civilian bartenders, and stated that the employment could not "logically be distinguished

from second jobs held by other off-duty military personnel." 704 F.2d at 1439. The court distinguished Johnson's situation from instances where "the plaintiffs had access to the various recreational and medical benefits only because of their status as military personnel." *Id.* at 1438.

This case falls into the latter category. Boat rentals were provided through the Luke AFB Recreation Center to "active duty members and their family members" and guests had to be supervised and accompanied by military personnel. Thus, Lt. McConnell's use of the USAF-owned boat on Lake Pleasant is more like the situation in *Bon* than in *Dreier*. Moreover, Lts. McConnell, Donohue, and Frodsham took possession of and transported the boat, indicating that they were exercising their privileges as service members rather than as civilian guests of Lt. Crowell or each other. Accordingly, neither *Dreier* nor *Johnson* preclude the panel from holding that the benefit accruing to Lt. McConnell — his use of the boat — was due to his status as a service member.

It is true that Lt. McConnell's activities were purely recreational on May 19, 2001, but this does not mean that they were unrelated to his military status. The plaintiffs in both *Bon* and *Costo* were similarly engaged in purely recreational activities. In *Costo*, we stated that "it has long been recognized — in our court, at least — that military-sponsored activities fall within the *Feres* doctrine, regardless of whether they are related to military duties." 248 F.3d at 868. Furthermore, the government here argues that the recreational activities are part of the military mission.[6]

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[6] The government asserts that

> [r]ecreational programs help reduce the stress caused by the arduous training and lifestyle members of the military are

Accordingly, the fact that Lt. McConnell was engaged in a military-sponsored recreational activity weighs in favor of the application of the *Feres* doctrine.[7]

Our review of the four factors reveals that appellants' claims implicate the third rationale of *Feres* — protection of

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> required to endure and provide opportunities for relaxation that otherwise are unavailable because of the location of military bases and the demands of military services. These are core military functions, no less than combat training and military medical care.

[7] As we noted in *Costo*, 248 F.3d at 868, cases from outside the Ninth Circuit support this conclusion. *See, e.g.*, *Pringle v. United States*, 208 F.3d 1220, 1227 (10th Cir. 2000) (soldier beaten by gang members after being ejected from military MWR club; "The relationship between the Army and service personnel engaged in recreational activities under the Army's MWR program is 'distinctively federal' in character."); *Walls v. United States*, 832 F.2d 93 (7th Cir. 1987) (crash of airplane belonging to recreational Aero Club); *Bozeman v. United States*, 780 F.2d 198, 201 (2d Cir. 1985) (patron of Non-Commissioned Officers Club injured when ejected by bouncer; "Johnny Bozeman was only entitled to be in the NCO club because he had an appropriate rank, was a member of the Army and was on active duty status."); *Woodside v. United States*, 606 F.2d 134 (6th Cir. 1979) (crash of airplane belonging to recreational Aero Club); *Hass ex rel. United States v. United States*, 518 F.2d 1138, 1141 (4th Cir. 1975) (injury while riding a horse rented from a Marine Corps-operated stable; "Recreational activity provided by the military can reinforce both morale and health and thus serve the overall military purpose."); *Chambers v. United States*, 357 F.2d 224, 229 (8th Cir. 1966) (death in on-base swimming pool; "As a matter of fact, Airman Chambers' use of the pool, which was a part of the base, was related to and dependent upon his military service; otherwise, he would not have been privileged to use it.").

military discipline. Because the situs of the alleged negligence is Luke AFB, allowing the suit to proceed would inherently require discovery of, and evaluation of, the command structure and regulations for inspecting and maintaining motorboats on the military base. Because Lt. McConnell and his colleagues were briefed on the Air Force's installation rules and regulations governing the use of the boat and were required to follow them, allowing the suit to proceed would inherently require discovery of, and evaluation of, the adequacy of the instructions, whether they were properly conveyed to Lt. McConnell and his colleagues, and whether they, as military officers, properly complied with the instructions. Because the government claims that Lt. McConnell's recreational use of the motorboat was related to his overall military mission, allowing the suit to go forward might well require a civilian court to evaluate whether the recreational use was so related and whether the recreational program met some standard of care. Our prior cases, particularly our decisions in *Bon* and *Costo*, hold that the *Feres* doctrine bars suit in a case like this because the concept of protecting military discipline is implicated.

IV

Finally, as in *Costo* we note that we apply the *Feres* doctrine "without relish." 248 F.3d at 869. We remain aware of the criticism that has been rightly leveled at the doctrine, but in light of the Supreme Court's failure to address the expansion of the *Feres* doctrine,[8] as a three-judge panel we remain constrained to follow our "well-worn path" of interpreting the *Feres* doctrine "to include military-sponsored

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[8] The Supreme Court denied the petition for certiorari filed in Costo. 534 U.S. 1078, 122 S. Ct. 808, 151 L. Ed. 2d 693 (2002).

recreational programs." *Id.* Accordingly, the district court's grant of summary judgment in favor of the government and against the appellants is **AFFIRMED**.

CONCUR BY: GOULD

CONCUR

GOULD, Circuit Judge, concurring:

I concur in Judge Callahan's opinion which accurately reflects our prior circuit precedent and its application here. However, I am left with the concern that our precedent interpreting the scope of the *Feres* doctrine creates an injustice. The justifications for the doctrine as applied to the death of Lieutenant McConnell seem slim to me, for it is unrealistic for our precedent to suggest that dismissal of the claim here is needed to foster military discipline. In my view, and respectfully, it would be appropriate for our court en banc to reassess the scope of the *Feres* doctrine. Also, many might welcome the Supreme Court's clarification of the doctrine's application in the case of military-sponsored recreational programs.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV 03-1886-PHX-JAT

[Filed December 13, 2004]

Lawrence Randall McConnell, individually;	)
Deborah Ellen McConnell, individually;	)
Lawrence Randall McConnell and	)
Deborah Ellen McConnell, as surviving parents of	)
Joseph James McConnell, deceased	)
Plaintiffs,	)
	)
vs.	)
	)
United States of America,	)
Defendant.	)
	)

ORDER

This case arises from a boating accident involving a United States Air Force ("USAF")-owned motorboat which resulted in the death of Second Lieutenant Joseph McConnell ("McConnell"). McConnell's parents, Lawrence and Deborah McConnell (collectively, "Plaintiffs"), are suing the United States of America (the "Government"), claiming that the Government's negligence caused McConnell's death. Presently before the Court is the Government's Motion for

Summary Judgment (Doc. #14). The sole issue raised in the Motion is whether Plaintiffs' claims are barred under the *Feres* doctrine. Because the Court finds that the *Feres* doctrine applies, and that the Court therefore lacks subject matter jurisdiction over this matter, it will grant the Government's Motion and dismiss this action.

I. Legal Standard

In its Motion for Summary Judgment, the Government seeks dismissal of this case for lack of subject matter jurisdiction under the *Fetes* doctrine. Although the Government has moved for summary judgment on this basis, "[a] motion to dismiss pursuant to the *Feres* doctrine is properly treated as a [Federal Rule of Civil Procedure] 12(b)(1) motion to dismiss for lack of subject matter, rather than as a motion for summary judgment." *Dreier v. United States;* 106 F.3d 844, 847 (9th Cir. 1997); *see Jackson v. United States,* 110 F.3d 1484, 1486 (9th Cir. 1997); *Atkinson v. United States,* 825 F.2d 202, 204 n.2 (9th Cir. 1987) ("When a court determines that the United States is immune from liability under the FTCA, the proper disposition is a dismissal for lack of subject matter jurisdiction, not a grant of summary judgment."). A motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) may either challenge the allegations of the Complaint as insufficient to confer subject matter jurisdiction, or may attack the existence of subject matter jurisdiction in fact. *Thornhill Publ'g Co., Inc. v. Gen. Tel. & Elecs. Corp.,* 594 F.2d 720, 733 (9th Cir. 1979). If the motion challenges the sufficiency of the Complaint's allegations, all allegations of material fact are taken as true and construed in the light most favorable to the non-moving party. *White v. Lee,* 227 F.3d 1214, 1241 (9th Cir. 2000). In resolving a factual attack on subject matter jurisdiction, no presumptive truthfulness attaches to the

plaintiff's allegations and the existence of disputed material facts will not preclude the Court from evaluating the existence of subject matter jurisdiction. *Thornhill,* 594 F.2d at 733.

Here, the Government's Motion challenges the existence of subject matter jurisdiction in fact, and thus falls within the latter category. Accordingly, the Court may accept and evaluate evidence to determine whether jurisdiction exists. *See Dreier,* 106 F.3d at 847 ("a Rule 12(b)(1) motion can attack the substance of a complaint's jurisdictional allegations despite their formal sufficiency, and in so doing rely on affidavits or any other evidence properly before the court"). Although the Court may consider matters outside of the Plaintiffs' Complaint, the Court must resolve all disputed facts in Plaintiffs' favor. *Id.* The Court will therefore proceed under this standard.

II. Factual Background

Plaintiffs filed this action against the United States pursuant to the Federal Tort Claims Act (the "FTCA" or the "Act"), 28 U.S.C. § 1346(b)(1) and § 2679, for the wrongful death of their son during a boating accident on Lake Pleasant on May 19, 2001. (Doc. #1.) Following the accident, in January 2003, Plaintiffs submitted a Claim for Damage, Injury, or Death, Standard Form 95, wherein they alleged that the USAF was negligent in repairing, servicing, and inspecting the motorboat and failed to warn its users and the public that it was defective and unreasonably dangerous. (Defendant's Statement of Facts ("DSOF") ex. #2, Addendum

at 2.) After the USAF denied their Claim, Plaintiffs initiated this lawsuit. The following facts are undisputed.[1]

At the time of the accident, Lieutenants McConnell, Steven Frodsham, Mark Donohue, and Matthew Crowell, were F- 16 student pilots in the USAF and assigned to Luke Air Force Base ("Luke AFB"), Arizona. (DSOF at ¶2; Plaintiffs' Objections to and Controversion of Statement of Facts ("PSOF") at ¶2.) On May 18, 2001, Crowell rented a motorboat from the Luke AFB Outdoor Recreation Center. (DSOF at ¶3; PSOF at ¶3.) The motorboat was registered to the Luke AFB Outdoor Recreation Center and owned by the USAF. (*Id.*) The following day, at about 9:00 a.m., McConnell, Frodsham, and Donohue took the motorboat to Lake Pleasant to waterski. (DSOF at ¶1; PSOF at ¶1.) Crowell was not with them, but planned to join them later that day. (DSOF at ¶10; PSOF at ¶10.) At approximately 10:36 a.m., while Frodsham was operating the motorboat and Donohue was on the boat as observer, McConnell went down in the water after a waterskiing run, (DSOF at ¶11; PSOF at ¶11.) Frodsham then steered the boat back around in an

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[1] The opening paragraph of "Plaintiffs' Objections to and Controversion of Statement of Facts" indicates that, "Plaintiffs object to and controvert all parts of the Statement of Facts that the United States filed in support of its Motion for Summary Judgment[ ], with the exception of such items as are specifically admitted below[.]" However, in the section entitled "Controversion and Objections to DSOF", Plaintiffs admit to Defendant's Statement of Facts in their entirety. In the subsequent section entitled "Plaintiffs' Statement of Facts", Plaintiffs then offer three additional factual statements, none of which contradict Defendant's Statement of Facts. Thus, despite the titling of Plaintiffs' Statement of Facts, the Court finds that there are no disputed material facts preventing it from addressing the *Feres* doctrine issue.

attempt to bring the ski rope back to McConnell, who was floating in the water by use of a personal floatation device. (DSOF ex. #2, Addendum at 2.) At this point, the boat surged out of Frodsham's control and struck McConnell in the head, causing a fatal brain injury. (DSOF at ¶ 11; PSOF at ¶11.) The Maricopa County Sheriff's Office subsequently investigated the accident, and found that the throttle cable on the motorboat had broken approximately 14 feet 7 ½ inches from the motor, causing the throttle to remain in the position set by Frodsham immediately before the break, and preventing him from slowing the boat except by turning off the ignition. (DSOF at ¶¶12, 13; PSOF at ¶¶12, 13,)

As indicated above, Crowell rented the motorboat from the Luke AFB Outdoor Recreation Center, which is a USAF nonappropriated[2] fund instrumentality located on Luke AFB. (DSOF at ¶4; PSOF at ¶4.) The Outdoor Recreation Center falls within the Services programs offer by the USAF and is under the control of the 56th Services Squadron, 56th Mission Support Group, and the 56th Fighter Wing commanders, which administer USAF Services programs at Luke AFB. (*Id.)* Air Force Instruction ("AFI") 34-262, *Services Programs and Use Eligibility* (27 April 2000), describes the purpose and importance of the Services programs as follows:

> **1.1 Purpose.** Services programs support the Air Force mission by contributing to readiness and improving productivity through programs promoting fairness, esprit-de-corps, and quality-of-life for authorized patrons or customers.

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[2] "A non-appropriated fund instrumentality is one that is not funded by Congressional appropriation." *Woodside v. United States*, 606 F.2d 134, 136 n.1 (6th Cir. 1979)

> **1.2 Importance.** Services programs are vital to mission accomplishment and form an integral part of the non-pay compensation system .... Services programs encourage positive individual values and aid in recruitment and retention of personnel. They provide for the physical, cultural, and social needs and general well-being of military members and their families, providing community support systems that make Air Force bases hometowns for a mobile military population.

(DSOF at ¶5; PSOF at ¶5.) Among the Services programs offered are "Services Morale, Welfare, and Recreation Fund (MWR) Category B: Community Support Programs", which are programs that "satisfy the basic physiological and psychological needs of AF members and families, providing, to the extent possible, the community support systems that make Air Force bases temporary home towns for a mobile military population...." (DSOF at ¶6; PSOF at ¶6.) The Luke AFB Outdoor Recreation Program is part of the Luke AFB MWR Program, which is funded, in part, by the Luke AFB MWR Fund ("MWRF"), a USAF nonappropdated fund instrumentality. (DSOF at 77; PSOF at ¶7.) As a USAF Category B MWR Program, the Luke AFB Outdoor Recreation Program receives funding support from both installation Operations and Maintenance appropriated funds and MWRF funds under rules set forth in AFI 65-106, *Appropriated Fund Support of Morale, Welfare, And Recreation And Nonappropriated Fund Instrumentalities* (28 October 1994). (*Id.*)

As stated in AFI 34-110, *Air Force Outdoor Recreation Programs* (22 July 1994), the purpose of the Outdoor Recreation Program, which operates the Luke AFB Outdoor Recreation Center, is to support individual and groups of

members' interests in off-duty outdoor recreation through the provision of information, referrals, equipment, recreation area management, and facilities. (DSOF at ¶8; PSOF at ¶8.) Boat rentals are an authorized part of the Outdoor Recreation Program and the eligibility requirements for renting a boat from the Outdoor Recreation Center on May 19, 2001, were as set forth in AFI 34-262, which included "[a]ctive duty members and their family members." (DSOF at ¶9; PSOF at ¶9.) Non-military guests are also allowed to use USAF recreational facilities and equipment, provided they obtain proper permission and are accompanied by military sponsors who are responsible for their conduct. (Plaintiffs' Additional Statement of Facts ("PASOF") at ¶3.) Neither the Outdoor Recreation Reservation/Rental Agreement that Crowell signed on May 18, 2001, nor the accompanying Boating Custody Receipt, restricted the invitation of guests to go skiing with the motor boat, whether those guests are in the ASAF or civilians. (PASOF at ¶2.)

III. Discussion

A. The Parameters of the *Feres* Doctrine

The Federal Tort Claims Act ("FTCA"), provides that, "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages." 28 U.S.C. § 2674. This waiver of sovereign immunity, however, is not without exceptions. Particularly, in *Feres v. United States*, 340 U.S. 135, 146 (1950), the United States Supreme Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of

or are in the course of activity incident to service." This exception is referred to as the "*Fetes* doctrine."

In reaching this decision, the Supreme Court identified three policy rationales underlying the doctrine: (1) the distinctly federal nature of the relationship between the Government and the armed forces requires a uniform system of compensation for soldiers stationed around the country and around the world; (2) a generous compensation scheme for soldiers (the Veterans' Benefits Act) serves as an ample alternative to tort recovery; (3) permitting military personnel to sue the armed forces would endanger discipline. *Id.* at 144-45. In the years following the *Feres* decision, federal courts, including the Supreme Court, have heavily criticized these policy rationales as a continuing basis for the *Feres* doctrine. *Costo,* 248 F.3d at 866. Cognizant of such criticisms, the Ninth Circuit has been reluctant to base its decisions applying the *Feres* doctrine on the policy justifications. *Id.* at 867. Instead, our circuit has articulated the following four factors for courts to consider when deciding whether a particular action is barred by the *Feres* doctrine:

> (1) the place where the negligent act occurred;
> (2) the duty status of the plaintiff when the negligent act occurred;
> (3) the benefits accruing to the plaintiffbecause of the plaintiff's status as a service member; and
> (4) the nature of the plaintiff's activities at the time the negligent act occurred.

Id. No single factor is dispositive. *Id.* Rather, courts are to look at the totality of the circumstances in making their decisions, *Id.* Additionally, recognizing that precedent applying the *Feres* doctrine are irreconcilable, the Ninth Circuit has indicated that "'comparison of fact patterns to

outcomes in cases that have applied the *Feres* doctrine' is the most appropriate way to resolve *Feres* doctrine cases." *Id.* (quoting *Dreier,* 106 F.3d at 848). Thus, courts in our circuit take a case-by-case approach when applying the *Feres* doctrine. Toward this end, the parties' respective briefs are focused on comparing and contrasting the facts of this case with prior cases either applying or declining to apply the *Feres* doctrine.

In its Motion, the Government argues that a comparison of this case with the Ninth Circuit's decisions in *Bon v. United States,* 802 F.2d 1092 (9th Cir. 1986), and *Costo* should lead the Court to conclude that application of the *Feres* doctrine is appropriate in this case. In both of *Bon* and *Costo,* the court held that *Feres* doctrine operated to bar the serviceperson's negligence claims against the federal government. More specifically, in *Bon,* an active duty Navy servicewoman sued the United States after she was injured when the canoe she rented from a Navy-recreational center was struck by another serviceman operating a recreational motorboat rented from the base. 802 F.2d at 1093. The court found that both the plaintiff and the other serviceman were on active duty when the accident occurred; that the activity was provided as a benefit of the plaintiff's military service; and that the activity was incident to her military service because the boat rental was governed by military regulations and the program was under the control of the base's commanding officer. *Id.* at 1095. Based on these factors, the court held that the plaintiff's activities were sufficiently incident to her military service, such that the *Feres* doctrine operated to bar her suit.

Relying heavily on *Bon,* the Ninth Circuit in *Costo* reached the same conclusion with respect to tort claims brought by the estates of two Navy servicemen who drowned

during a Navy-sponsored rafting trip on the Nooksack River in Washington. 248 F.3d at 864. At the time of the accident, both servicemen were off-duty and on liberty, *Id.* Additionally, the rafting program was operated within the command structure of the military and was part of the Navy's Morale, Welfare, and Recreation programs. *Id.* at 865. Applying the four-factor test and comparing the facts of that case to *Bon,* the Ninth Circuit found:

> Like Janice Bon, Costo and Graham were on active duty but on liberty at the time of the accident. Like the canoe rental in *Bon,* the rafting trip was provided as a benefit of military service. And, as in *Bon,* the MWR program here was under the command of the base's commanding officer. On these facts alone, *Bon* would be dispositive.

Id. at 867. The court also rejected the plaintiffs' attempt to distinguish that case from *Bon* based on the fact that the accident occurred off-base. *Id.* at 868. Instead, the court advised that "the appropriate consideration is the 'situs of the negligence,' not the location of the accident." *Id.* (*citing Johnson v. United States,* 701 F.2d at 1436). The court went on to find that "much of the alleged negligence was supervisory, and occurred on base." *Id.* In addition to its reliance on *Bon,* the court also noted that "it has long been recognized ... that military-sponsored activities fall within the *Feres* doctrine, regardless of whether they are related to military duties." *Id.* at 868. In particular, the court cited several decisions from other circuits holding that recreational activities sponsored by the military fall within the *Feres* doctrine's purview. *Id.* Thus, the court concluded that it was "compelled" to hold that the plaintiffs' suits were barred, *Id.* at 869.

Plaintiffs, on the other hand, offer several cases that they claim militate against application of the *Feres* doctrine. First, Plaintiffs cite *Brooks v. United States,* 337 U.S. 49 (1949), a pre-*Feres* case, wherein the Supreme Court addressed "whether members of the United States armed forces can recover under [the Federal Tort Claims Act] for injuries not incident to their service." *Id.* at 50. There, two brothers who were in the armed forces and on furlough were driving with their father on a public highway when their car was struck by a United States Army truck driven by a civilian employee of the Army, killing one brother and injuring the other. *Id.* After the surviving brother and the estate of the deceased sued under the FTCA, the government moved to dismiss the case on the ground that both brothers were in the armed forces at the time of the accident and were therefore barred from recovery under the FTCA. *Id.* The district court denied the motion, but the court of appeals reversed. *Id.* at 50-51. The United States Supreme Court, however, agreed with the district court. In assessing whether the claims were permitted under the FTCA, the Court found that none of the exceptions in the Act applied to the facts of that case. *Id.* at 52. Specifically, the Court noted that the accident was not related to the brothers' military careers and that, had the accident been incident to their service, "a wholly different case would be presented." *Id.* at 52. Accordingly, the Court held that the claims were permitted under the Act. *Id.* at 54.

Next, Plaintiffs cite *Mills v. Tucker,* 499 F.2d 866 (9th Cir. 1974). There, Mills, a petty officer in the Navy, was killed in a traffic accident on a roadway maintained by the Navy when he was struck by a car driven by Tucker. *Id.* at 867. Mills's survivors sued the United States for negligently maintaining the road. The government argued that it was immune from the suit under the *Feres* doctrine. In determining whether the doctrine applied, the court focused on whether Mills was

subject to military discipline at the time of the accident, On this point, the court found that "Mills was on furlough on the day of the accident; he was returning from a civilian job, in which he was 'moonlighting' as a fry cook, to his Navy-owned quarters where he was to attend his son's birthday party. He was thus in the same situation as the serviceman in *Brooks* - only in the remotest sense subject to military discipline." *Id.* The court also noted that the roadway was not part of the Naval depot, but was publicly used. Based on these factors, the court held that the *Feres* doctrine did not apply, *Id.* at 868.

Plaintiffs next offer *Johnson v. United States*, 704 F.2d 1431 (9th Cir. 1983), in furtherance of their claims. In *Johnson,* a noncommissioned USAF officer (Johnson) was injured when riding as a passenger in a car owned and driven by a USAF sergeant (Hays). *Id.* at 1433. Both servicemen were on active duty at the time of the accident. *Id.* Additionally, during their off-duty hours both worked as bartenders at the Noncommissioned Officers ("NCO") Club on the base. *Id.* On the night of the accident, Johnson and Hays were working at the club and decided to have a party after the club closed at 2:00 a.m. *Id.* Another employee had driven to an off-base liquor store to buy liquor for the party, *Id.* After the party ended at approximately 4:30, Hays offered to drive Johnson to his house off-base. *Id.* About a mile outside of the base, Hays's car collided with a tree, and Johnson sustained a severe neck injury leaving him permanently and totally disabled. Johnson thereafter sued the United States for damages resulting from his injuries.

On appeal, the Ninth Circuit addressed the Government's argument that the case should be dismissed under *Feres*. The court first analyzed the place where the negligent act occurred. Although the court found that the negligent act -

permitting the NCO club to remain open in violation of both state and USAF regulations - occurred on the base, it nevertheless found that "the connection between the situs of the negligence and Johnson's military service is so tenuous that location is not an important factor." *Id.* at 1437. Specifically, the court found that Johnson was performing a non-military job in what was essentially a civilian context. *Id.* Next, the court examined Johnson's duty status when the negligent act occurred. The court cautioned that Johnson's duty status "is relevant only insofar as it bears on the relationship between the activity leading to the injury and his military service." *Id.* at 1438. Thus, the court explained that, "[t]he important question is whether the service member on active duty status was engaging in an activity that is related in some relevant way to his military duties." *Id.* In that case, it was undisputed that Johnson was on active-duty status with the USAF at the time of the accident. Nevertheless, the court found that Johnson's off-duty work as a bartender bore no relationship to the military disciplinary structure that the *Feres* doctrine was meant to safeguard. *Id.* Instead, it found his position "similar to the sort of second job in the civilian section that any off-duty service member might undertake," and, based on this fact, was sufficient to eliminate any relevant links between his activities and his military service. *Id.*

Third, the court evaluated the benefits accruing to Johnson because of his status as a service member. In its discussion, the court recognized that courts have routinely held that the *Feres* doctrine bars suits by service members injured while participating in on-base or government-sponsored recreational activities, as well as suits by active duty service members injured by medical malpractice of military doctors. *Id.* The court went on to state that "[t]he one factor that best explains the results in these cases is that the plaintiffs had access to the

various recreational and medical benefits only because of their status as military personnel." *Id.* Thus, the court opined that the injuries suffered were incident to service because the plaintiffs would not have been privileged to take advantage of the of the benefits but for their status as servicemen. Applying this principle, the court found that Johnson's employment at the NCO Club during his off-duty hours was not a privilege or benefit incident to his military service, and could not be distinguished from second jobs held by off-duty military personnel. *Id.* at 1439.

The court then analyzed the nature of Johnson's activities at the time of the negligent act. Noting that the "fundamental goal of the *Fetes* doctrine is to safeguard the military disciplinary structure from disruptive civil suits," the court proposed that "the most relevant line of inquiry is whether or not the service member's activities at the time of injury are of the sort that could harm the disciplinary system if litigated in a civil action." *Id.* Because Johnson was not subject to the "compulsion of military orders or performing any sort of military mission"; his activities were "purely personal", and because his conduct did not involve "the sort of closely military judgment calls that the *Feres* doctrine was designed to insulate from judicial review," the court found that Johnson should be allowed to recover. *Id.* Taking all of these factors into consideration, the court declined to apply the *Feres* doctrine to bar Johnson's suit.

Finally, Plaintiffs cite *Dreier* in support of their claims. There, a widow brought a wrongful death lawsuit under the FTCA against the United States after her husband, a soldier in the Army, was killed after falling into a wastewater drainage channel located on Fort Lewis, Washington. At the time of the accident, Dreier was off-duty and enjoying an "afternoon of relaxation and beer drinking." *Id.* at 845.

Finding that his death was incident to his military service, the district court concluded that the claim was barred by the *Feres* doctrine. On appeal, after undertaking an extensive review of prior *Fetes* cases, the Ninth Circuit reversed. First, the court noted that although Dreier was on the base at the time of his death, the situs of his injury was not determinative. *Id.* at 852 (citing *Johnson,* 704 F.2d at 1437). Second, it found the fact that Dreier has been released from duty only for the day to be a relevant factor. *Id.* at 883. Particularly, looking past Dreier's active duty status, the court found that Dreier's presence at the park area where he fell was indistinguishable from that of a civilian participating in the same leisure activities. *Id.* As the court explained, "as an individual drinking beer and swimming during his leisure time in an area to which the public has access, [Dreier] was in the same position as any civilian would have been at the time of the government's negligence." *Id.*

As to the final two factors, the court found that the benefits accruing to Dreier from his military status and the nature of his activities at the time of his death both militated against application of the doctrine. *Id.* The court noted that unlike the facts in *Bon,* where the Special Services Center was limited to military personnel and their guests and dependents, the park area was generally open to the public. *Id.* Accordingly, Dreier's ability to use the park area where he was killed was not a privilege or benefit incident to his military service. Finally, the court assessed whether Dreier's activities at the time of his death were of the type that could harm the military's disciplinary system if litigated in a civil action. The government argued that Dreier was subject to direct military control at the time of his death because his immediate superior was present, military regulations governed land use on the base, and Dreier was subject to immediate recall. The court, however, rejected this argument, finding

that Dreier was subject to military discipline "only in the very remotest sense," and was definitely not "subject to military orders and regulations for the *particular activity in which [he] was engaged.*" *Id.* (quoting *Bon,* 802 F.2d at 1096). Moreover, the court noted that "[q]uestioning the government's negligence in securing the area around the sluice will 'not involve the sort of close military judgment call that the *Feres* doctrine was designed to insulate from judicial review." *Id.* (quoting *Johnson,* 704 F.2d at 1440). Taking these findings into consideration, the court held that, based on the totality of the circumstances, there were insufficient *Fetes* concerns present to bar Dreier's FTCA claim against the United States. *Id.* at 855.

B. Application of the Four-Factor Test

With these cases as guidance, the Court must now apply the four-factor test to determine which line of cases the instant matter more closely resembles.

First, the Court must examine the place where the allegedly negligent act occurred. On this point, Plaintiffs' brief appears internally inconsistent. In their Response, Plaintiffs argue that "the accident happened in a civilian recreational lake far from any military base or military activity." (Doc. #9 ("Response") at 10.) They also assert that "the government's tortious action was not complete until the motor boat malfunctioned, and, ***at that time,*** Lieutenant McConnell was undeniably swimming in the lake." (Resp. at 8 (emphasis in original).) At the same time, however, Plaintiffs also argue that "the throttle of the boat broke [] due to poor maintenance, service[,] and repair by the federal government *at the recreation center.*" (Resp. at 3 (emphasis added).) As indicated above, "[t]he appropriate consideration is the 'situs of the negligence,' not the location of the

accident." *Costo,* 248 F.3d at 865. Unlike the more common scenario, where the situs of the negligent act is certain, *see, e.g., Mills,* 499 F.2d at 867 (serviceman killed in traffic accident on road maintained by Navy), the location where the negligence occurred in this case is less clear. Plaintiffs' theory is that the government negligently maintained the boat, but they also claim that the negligence was not complete until the boat malfunctioned and fatally struck McConnell.[3] Because any maintenance, or lack thereof, would have occurred at the Outdoor Recreation Center, as opposed to in the water of Lake Pleasant, Luke AFB is more appropriately labeled as the location where the negligent act occurred. *See Costo,* 248 F.3d at 868 (finding that "much of the alleged negligence" that led to drowning death of two servicemen in Navy-led recreational rafting trip "was supervisory, and occurred on base.") Nevertheless, whether the Court finds that the negligent act occurred on Luke AFB or at Lake Pleasant, this factor is not dispositive. *See id.; Johnson,* 704 F.2d at 1437 ("The occurrence of government negligence on a military base should not automatically bar recovery[;] [e]ven when the negligence occurred on-base, the court is obligated to explore the nature of the 'function the soldier was performing at the time of the injury in order to ascertain the totality of the circumstances.") (internal quotations omitted); *Bon,* 802 F.2d at 1095 (location of accident is important but not controlling). Thus, the Court turns to the remaining factors.

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[3] Thus, it appears that Plaintiffs seek to define the location where the negligent act occurred according to a tort/negligence cause of action theory which takes into account causation and where the actual injury occurred. As indicated above, the standard that the Ninth Circuit has adopted literally restricts this inquiry to the location where the negligent act occurred.

Second, the Court must assess McConnell's duty status. It is undisputed that McConnell was an active duty USAF lieutenant, and was off-duty at the time of the accident, Plaintiffs argue the fact that McConnell was off-duty places this case in line with the *Brooks- Mills-Johnson-Dreier* line of cases all of which involved servicemen who were off-duty, on furlough, or on liberty at the time they were injured. As the Ninth Circuit explained in *Johnson*, "duty status is relevant insofar as it bears on the relationship between the activity leading to the injury and [service member's] military service." *Johnson,* 704 F.2d at 1438. Accordingly, "[t]he important question is whether the service member on active duty status was engaging in an activity that is related in some relevant way to his military duties," *Id.* In *Johnson,* for instance, the court found that the plaintiff's off-duty job as a bartender at the NCO Club bore no relation to his military duties, but placed him in the same position as any civilian employee of the NCO Club at the time of the government's negligence. *Id.* Likewise, in *Dreier,* the court found that "as an individual drinking beer and swimming during his leisure time in an area which the public has access, [Dreier] was in the same position as any civilian would have been at the time of the government's negligence." 106 F.3d at 853. Similarly, in *Mills,* although the court noted that Mills was on furlough at the time of his accident, it focused its attention on the broader issue of whether his act of driving home from his second job off-base was connected to his military duties. 499 F.2d at 867-68. Analogizing Mills' case to that of the brothers in *Brooks,* who were on furlough and driving on a public road when injured, the court found that Mills was subject to military discipline "only in the remotest sense", militating against application of the *Feres* doctrine.

In contrast, in *Bon* and *Costo,* the fact that the injured servicemen were off-duty at the time of their injury did not

preclude the Ninth Circuit from finding that the *Feres* doctrine applied to bar their claims. Rather, consistent with the foregoing cases, the court focused its analysis on the nature of the activities. Thus, the fact that McConnell was off-duty at the time of the accident, weighs slightly in favor of finding that the *Feres* doctrine does not apply. However, as discussed more fully below, the more pertinent inquiry is whether McConnell's activity while off-duty was related to his military service.

Third, the Court analyzes the benefits accruing to McConnell because of his status as a member of the USAF. The Government argues that the rental and use of the USAF-owned motorboat was a benefit of McConnell's military service. In opposition, Plaintiffs argue that because Crowell rented the motorboat and McConnell was Crowell's guest, any benefits McConnell received stemmed from his friendship with Crowell, rather than from McConnell's status as a member of the USAF. Plaintiffs also contend that McConnell was in the same position as any civilian at the time of the accident because the USAF regulations allow civilian guests to use recreational equipment.

Plaintiffs' arguments, however, are unpersuasive. First, while Plaintiffs are correct that Crowell rented the motorboat, it was McConnell, Frodsham, and Donohue who actually took possession of the boat, transported it to Lake Pleasant, and used it throughout the morning of May 19th. These facts suggest that Crowell rented the boat for the benefit, if not on behalf of, all four men. *(See* DSOF ex. #1 at 12-13 ("Mr. Crowell had rented the watercraft on Friday, May 18, 2001 as Mr. McConnell, Mr. Frodsham, and Mr. Donohue were all in a meeting and unable to rent the watercraft."). Moreover, the fact that Crowell was not present while McConnell, Frodsham, and Donohue were using the boat

weighs against Plaintiffs' argument that McConnell was Crowell's guest. (*See* DSOF ex, #4, AFI34-262 (27 April 2000), § 3.1.2 ("Guests have the same priority as their sponsors *who must accompany them and be responsible for their conduct.*")). Rather, like the plaintiff in *Bon,* McConnell "enjoyed the use of the [Outdoor Recreation Center] solely by virtue of [his] status as a member of the military." 802 F.2d at 1095; *see Latchum v. United States,* 183 F. Supp. 2d 1220, 1233 (D. Haw. 2001) (finding that even though civilians may use Army Recreational Center, decedent-serviceman's use was benefit that derived from his military status). Thus, the Court agrees with the Government that McConnell's use of the motorboat was a benefit of his position as a USAF serviceman. Had McConnell not been an F-16 student pilot at Luke AFB, he would not have had access to the benefits and services of the Outdoor Recreation Center, including use of the motorboat. This factor therefore supports application of the *Fetes* doctrine.

Fourth, the Court must examine the nature of the activity McConnell was engaged in at the time of his injury. It is undisputed that McConnell was not engaged in an official action at the time he was injured. However, the parties offer competing characterizations of McConnell's recreational activity at Lake Pleasant. Plaintiffs argue that at the time the boat malfunctioned McConnell "was simply swimming in the lake, an activity open to any American capable of floating." (Resp. at 11,) Thus, they assert that "[t]here was nothing whatsoever 'incident to service' when the accident occurred?" (*Id.*) The Government, on the other hand, argues that McConnell's use of the USAF's motorboat as part of the Outdoor Recreation Program mirrors the recreational activities at issue in *Bon* and *Costo.* The Court agrees with the Government.

In *Bon*, the court found that the servicewoman's rental and use of the canoe from the Navy's Special Services Center was such that "its entire scope was subject to military orders and discipline." 802 F.2d 1095. Specifically, the court found that "both Bon and the motor boat operator were subject to discipline for violations of the Special Service rules governing their use of its facilities and equipment and that the Special Service Center itself was directly under the control of the commanding officer of the San Diego Naval Training Center." *Id.* Thus, the court concluded that "the presence of direct military control is sufficient to establish the activity as incident to military service." *Id.* at 1096.

Citing the court's analysis in *Bon*, the court reached the same conclusion with respect to the recreational program at issue in *Costo*. Specifically, the court noted that the rafting program the two servicemen were participating in was operated within the command structure of the Navy and was part of the Navy's various recreational programs intended to "effectively contribute to the morale, well-being and quality of life of naval personnel and their family members." *Id.* at 868.

As described above, Lieutenants McConnell, Frodsham, and Donohue were using a boat owned by the USAF and provided by Luke AFB's Outdoor Recreation Center - a USAF organization under the control of the 56th Services Squadron, 56th Mission Support Group, and the 56th Fighter Wing commanders. The Outdoor Recreation Center is part of the Luke AFB Outdoor Recreation Program, which is a component of the Luke AFB Morale, Welfare, Recreation, and Services Programs. McConnell, Frodsham, and Donohue were briefed and were required to follow installation rules and regulations governing the use of the boat. (Def. ex. #3 at ¶11.) Thus, McConnell's activity was both sponsored by the

USAF, and USAF regulations governed his use of the motorboat.[4] As the Ninth Circuit explained in *Costo*, "[w]hatever the original scope of the *Fetes* doctrine, it is clear that it has been interpreted throughout the lower courts - and, specifically, by our court - to include military-sponsored recreational programs." 248 F.3d at 869. Accordingly, the Court finds that Luke AFB's Outdoor Recreation Program and McConnell's participation in the program through his use of the motorboat are identical to the recreational activities evaluated in *Bon* and *Costo*. Thus, because McConnell's activity was directed connected to the USAF, this factor weighs in favor of application of the *Fetes* doctrine.

As previously explained, the Court does not look at any single factor in isolation, but considers the totality of the circumstances. Applying these factors to the facts of this case, and considering them in light of prior *Feres* doctrine cases, the Court finds that they weigh in favor of applying the *Feres* doctrine. Although McConell was off-duty and outside of

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[4] Furthermore, Plaintiffs' attempt to characterize McConnell's conduct at the time of the accident as "simply swimming in the lake" is based on an overly-restrictive reading of the facts. While Plaintiffs are correct that McConell was swimming in the water at the time he was struck by the motorboat, he was in the water because he was attempting to water ski. The undisputed facts are that after a failed run, McConnell went down into the water, at which time Frodsham steered the boat around McConnell to bring the ski rope back to him. It was at this point that the boat malfunctioned and struck McConnell. Thus, McConnell's act of "swimming in the lake" cannot be isolated from his act of waterskiing. *See Latchum*, 183 F. Supp. 2d at 1233-34 (rejecting plaintiffs' argument that serviceman staying on military housing was "merely standing on his porch" when shot and thus was only subject to military rules in the remotest sense for purposes *of Fetes* analysis).

Luke AFB at the time he was injured, he was, nevertheless, participating in a USAF/Luke AFB recreation program. Specifically, McConnell, along with Lieutenants Frodsham and Donohue, were using a USAF-owned motorboat rented from the Luke AFB Outdoor Recreation Center. The rental and use of the boat through the Luke AFB Outdoor Recreation Center was a benefit of McConnell's status as a student pilot at Luke AFB. Additionally, the boat rental was governed by USAF regulations and was under the control of the 56th Services Squadron, 56th Mission Support Group, and the 56th Fighter Wing commanders. Taken together, these facts place this case in line with *Bon* and *Costo,* and compel the Court to reach the conclusion that McConnell's activity at the time of his injury was sufficiently incident to his military service to bar this action under the *Feres* doctrine. The Court therefore lacks subject matter jurisdiction over this action.

IV. Conclusion

For the foregoing reasons,

IT IS ORDERED that Defendant's Motion for Summary Judgment is **GRANTED** as follows: It is ordered dismissing this case for lack of subject matter jurisdiction

DATED this 10 day of December, 2004.

/s/
James A. Teilborg
United States District Judge